



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

In Re: 466807

Date: JULY 10, 2020

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Advanced Degree Professional

The Petitioner seeks to employ the Beneficiary as a business intelligence analyst under the second-preference, immigrant classification for members of the professions with advanced degrees or their equivalents. Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A).

The Director of the Texas Service Center denied the petition. The Director concluded that, contrary to regulations, the record did not establish the permanent, full-time nature of the offered position or the validity of the accompanying certification from the U.S. Department of Labor (DOL) for the area of intended employment.

The Petitioner bears the burden of establishing eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as an advanced degree professional generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, a prospective employer must first obtain DOL certification. *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position. *Id.* Labor certification also indicates that employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

If DOL approves a position, an employer must next submit the certified labor application with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS considers whether a beneficiary meets the job requirements of a certified position and a requested immigrant visa classification. If USCIS approves a petition, a foreign national may finally apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

II. PERMANENT, FULL-TIME EMPLOYMENT

A petitioner must intend to employ a beneficiary under the terms of an accompanying labor certification. *See Matter of Izdebska*, 12 I&N Dec. 54, 55 (Reg'l Comm'r 1966) (affirming a petition's denial where, contrary to the labor certification, a petitioner did not intend to employ a beneficiary as a domestic worker on a full-time, live-in basis). For labor certification purposes, employment must constitute “[p]ermanent, full-time work.” 20 C.F.R. § 656.3 (defining the term “employment”).

Here, the accompanying labor certification describes the offered position of business intelligence analyst as a full-time, permanent position.

Based on a totality of the evidence submitted, the Petitioner has demonstrated the permanent, full-time nature of the offered position. We will therefore withdraw the Director's contrary finding.

III. VALIDITY OF THE LABOR CERTIFICATION

Unless accompanied by an application for Schedule A designation or documentation of a beneficiary's qualifications for a shortage occupation, a petition for an advanced degree professional must include a valid, individual labor certification. 8 C.F.R. § 204.5(k)(4)(i). A labor certification remains valid only for the particular job opportunity, foreign national, and geographical area of intended employment stated on it. 20 C.F.R. § 656.30(c)(2). The term “area of intended employment” means “the area within normal commuting distance of the place (address) of intended employment.” 20 C.F.R. § 656.3; *see also Matter of Sunoco Energy Dev. Co.*, 17 I&N Dec. 283, 284 (Reg'l Comm'r 1979) (affirming a petition's denial where the petitioner intended to employ the beneficiary in Texas, rather than in Utah as listed on the labor certification).

Here, the labor certification states the area of intended employment of the offered position of business intelligence analyst as the Petitioner's headquarters in New Jersey. The Director noted evidence that the Beneficiary worked on a project in Georgia. The Director therefore concluded that the petition lacks a labor certification valid for the actual area of intended employment.

A preponderance of evidence, however, establishes the validity of the area of intended employment listed on the labor certification. We will therefore withdraw the Director's contrary decision.

IV. ABILITY TO PAY THE PROFFERED WAGE

The appeal overcomes the denial grounds, but the record does not demonstrate the petition's approvability. Although unaddressed by the Director, the Petitioner has not demonstrated its ability to pay the proffered wage of the offered position.

A petitioner must demonstrate its continuing ability to pay a proffered wage, from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). If a petitioner employs less than 100 people, as in this case, evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

Here, the accompanying labor certification states the proffered wage of the offered position of business intelligence analyst as \$90,459 a year. The petition's priority date is June 11, 2014.

The Petitioner submitted copies of its federal income tax return for 2013 and a financial statement for 2014. The tax return does not demonstrate the company's ability to pay from 2014, the year of the petition's priority date. Also, contrary to 8 C.F.R. § 204.5(g)(2), the financial statement does not indicate that it is audited. The record therefore does not contain required evidence of the Petitioner's ability to pay the proffered wage from the petition's priority date onward.

Also, USCIS records indicate the Petitioner's filing of multiple Form I-140 petitions. A petitioner must demonstrate its ability to pay the proffered wage of each petition it files from a priority date onward. 8 C.F.R. § 204.5(g)(2). This Petitioner must therefore demonstrate its ability to pay the combined proffered wages of this petition and any others that were pending or approved as of this petition's priority date or filed thereafter. *See Patel v. Johnson*, 2 F.Supp.3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petition's approval where, as of the filing's grant, a petitioner did not demonstrate its ability to pay the combined proffered wages of multiple beneficiaries).¹

The Petitioner identified three other Form I-140 petitions that it filed. USCIS records, however, indicate the company's filing of at least 16 other Form I-140 petitions that were pending or approved as of June 11, 2014, or filed thereafter.²

The record lacks the proffered wages and priority dates of the Petitioner's other petitions. USCIS therefore cannot calculate the amount of combined proffered wages the company must demonstrate its ability to pay. Because the Director's NOI did not address this evidentiary deficiency, we will remand the matter.

On remand, the Director should ask the Petitioner to submit copies of annual reports, federal tax returns, or audited financial statements for 2014 through 2019. The Petitioner must also provide the proffered wage amounts and priority dates of its other petitions. The company may also submit additional evidence of its ability to pay, including proof of wages paid to applicable beneficiaries in relevant years and materials supporting the factors stated in *Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

The Director should provide the Petitioner with a reasonable opportunity to submit the requested evidence. Upon receipt of a timely response, the Director should review the entire record and enter a new decision.

¹ The Petitioner need not demonstrate its ability to pay proffered wages of petitions that it withdrew or that USCIS rejected, denied, or revoked. The Petitioner also need not demonstrate its ability to pay proffered wages before the priority dates of corresponding petitions or after corresponding beneficiaries obtained lawful permanent residence.

² USCIS records identify the 15 other petitions by the following receipt numbers:

[REDACTED]						
[REDACTED]						
[REDACTED]						

and [REDACTED]

V. CONCLUSION

Contrary to the Director's decision, the record demonstrates the permanent, full-time nature of the proposed employment and the validity of the accompanying labor certification for the area of intended employment. The Petitioner, however, has not demonstrated its ability to pay the proffered wage of the offered position from the petition's priority date onward.

ORDER: The decision of the Director is withdrawn. The matter is remanded for entry of a new decision consistent with the foregoing analysis.